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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/831,899	05/24/2001	Gerard Reynaud	208822US6XPC	3169

22850 7590 07/10/2002  
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EXAMINER
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EREZO, DARWIN P

ART UNIT	PAPER NUMBER
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3761

DATE MAILED: 07/10/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/831,899	REYNAUD, GERARD
	Examiner Darwin P. Erez	Art Unit 3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) Responsive to communication(s) filed on 24 May 2001.

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) Claim(s) 9-16 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 9-16 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 24 May 2001 is/are: a) accepted or b) objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.

    If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

    1. Certified copies of the priority documents have been received.

    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.

    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

    a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) 3-4.

4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.

5) Notice of Informal Patent Application (PTO-152)

6) Other: \_\_\_\_\_.

## DETAILED ACTION

### ***Information Disclosure Statement***

1. The information disclosure statement filed 10/18/2001 fails to comply with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609 because it fails to provide a translation of the foreign art, WO 99/27523. It has been placed in the application file, but the information referred to therein has not been considered as to the merits. Applicant is advised that the date of any re-submission of any item of information contained in this information disclosure statement or the submission of any missing element(s) will be the date of submission for purposes of determining compliance with the requirements based on the time of filing the statement, including all certification requirements for statements under 37 CFR 1.97(e). See MPEP § 609 ¶ C(1).

### ***Claim Rejections - 35 USC § 101***

2. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 9-16 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. Human beings and/or human anatomy are not statutory subject matter and as such cannot be positively set forth as an element(s) of a claimed combination. In Claim 9, “.....a user's mouth is positioned in the mask.....” should read (e.g. --...a user's mouth is positioned in the mask during use...--).

***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 9-12, 14 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over US 5,503,141 to Kettl et al.

5. **As to claim 9**, Kettl teaches an oxygen mask with a sound pick-up device comprising a flexible cap 6 and a first microphone capsule 4, wherein the mask comprises a mouth-piece 2 mounted in front of the first microphone capsule with an aperture turned towards a location at which a user's mouth is positioned in the mask and, taking this position of the mouth into consideration, the mouth-piece has an axis passing substantially through a junction line of the user's lips (when in use) and the aperture is substantially parallel to a labial plane tangential to the user's lips (when in use), just before the mouth.

Kettl fails to specifically teach an exhalation port positioned below the microphone capsule. However, Kettle teaches a respiratory tube located below the microphone capsule (see Fig. 1) and it is known in the art to have a respiratory tube having both inspiratory and expiratory ports. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have an expiratory port located below the microphone capsule because it is known in the art to have a respiratory tube having both inspiratory and expiratory ports.

6. **As to claim 10**, Kettl discloses a circular aperture of the mouth-piece.

Kettl does not disclose expressly an elliptical aperture of the mouth-piece.

At the time the invention was made, it would have been an obvious matter of design choice to a person of ordinary skill in the art to use an elliptical aperture because Applicant has not disclosed that an elliptical aperture provides an advantage, is used for a particular purpose, or solves a stated problem. One of ordinary skill in the art, furthermore, would have expected Applicant's invention to perform equally well with either the circular aperture of Kettl or the claimed elliptical aperture because both type of aperture perform the same function.

Therefore, it would have been obvious matter of design choice to modify Kettl to obtain the invention as specified in claim 10.

7. **As to claims 11**, Kettl discloses an acoustic screen **32** positioned in the aperture.

8. **As to claim 12**, Kettl discloses a cloth screen positioned in the aperture.

Kettl does not disclose expressly a metal lattice screen.

At the time the invention was made, it would have been an obvious matter of design choice to a person of ordinary skill in the art to use a metal lattice screen because Applicant has not disclosed how the metal lattice screen provides an advantage, is used for a particular purpose, or solves a stated problem. One of ordinary skill in the art, furthermore, would have expected Applicant's invention to perform equally well with either the cloth screen of Kettl or the claimed metal lattice screen because both screens perform the same function.

Therefore, it would have been obvious matter of design choice to modify Kettl to obtain the invention as specified in claim 12.

9. **As to claim 14**, Kettl teaches a cable connected to the microphone capsule.
10. **As to claim 16**, Kettl discloses the claimed invention except for the mask further comprising a second microphone capsule. It would have been obvious to one of ordinary skill in the art at the time the invention was made to add a second microphone capsule, since it has been held that mere duplication of the essential working parts of a device involves only routine skill in the art. *St. Regis Paper Co. v. Bemis Co.*, 193 USPQ 8.
11. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kettl and in view of US 4,961,420 to Cappa et al.
12. **As to claim 13**, Kettl teaches all the limitations of the claims except for a mask further comprising a baffle fixedly joined to the flexible cap and positioned between the microphone capsule and the exhalation port.

Cappa teaches a baffle **40** attached to a cap and positioned above an exhalation port.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to add the baffle of Cappa in the device of Kettl in order to prevent air from penetrating the upper portions of the mask (col. 7, lines 36-43).

13. Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kettl et al. and in further view of US, 3,910,269 to Ansite et al.

14. **As to claim 15**, Kettl teaches all the limitations of the claim except for a mask further comprising plural catches joined to the flexible cap and mounted substantially perpendicular to an external face of the flexible cap.

Ansite teaches a mask having plural catches **53** joined to a flexible cap and mounted substantially perpendicular to an external face of the flexible cap.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the mask of Ansite with the microphone capsule of Kettl because Kettl discloses that the microphone capsule is capable of mounting to any respiratory mask (col. 4, lines 36-37), including that of Ansite.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Darwin P. Erezo whose telephone number is (703) 605-0420. The examiner can normally be reached on M-F (8:30-5:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Aaron Lewis can be reached on (703) 308-0716. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9302 for regular communications and (703) 872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0858.

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dpe  
July 3, 2002

  
Aaron J. Lewis  
Primary Examiner